

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ORIGINAL

In the Matter of
Southwestern Bell Telephone Company
Tariff F.C.C. No. 73
Transmittal No. 2633

)
)
)
)
)

CC Docket No. 97-158
CCB/CPD 97-67

RECEIVED

JAN 12 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MCI OPPOSITION TO PETITION FOR RECONSIDERATION

Alan Buzacott
MCI Telecommunications Corp.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-3204

January 12, 1998

No. of Copies rec'd
List A B C D E

024

TABLE OF CONTENTS

I.	Introduction	1
II.	Background	2
III.	Dominant LEC Pricing Flexibility Should be Addressed in the Access Reform Proceeding	3
IV.	Commission Precedent Does Not Require Application of the Competitive Necessity Doctrine to Single-Customer Tariffs	4
V.	The Public Interest Does Not Support Unfettered Pricing Flexibility	7
VI.	The Commission Should Reject SWBT's Constitutional Argument	11
VII.	Conclusion	13

SUMMARY

In this proceeding, as it has on several previous occasions, SWBT is insisting on its alleged right to change Commission policy and rules in a tariff proceeding. The Commission is correct to observe that the access charge rulemaking will enable it to consider, as a broader matter, under what circumstances incumbent LECs should be accorded greater pricing flexibility than they already have. Based on the record in this proceeding, the Commission is correct to reject Transmittal No. 2633 as unlawful because it presents a significant potential for harm to the competitive market.

SWBT makes three arguments in support of its petition for reconsideration. First, SWBT argues that, contrary to the Order, applicable precedent supports use of the competitive necessity doctrine in this case. Second, SWBT disputes the Commission's conclusion that SWBT's Transmittal No. 2633 may foreclose competition and is not in the public interest. Third, SWBT argues that the Commission's decision to preclude it from filing RFP tariffs is confiscatory, violates SWBT's right to equal protection under the law, and thereby exceeds the Commission's authority. These arguments are without merit, and should be rejected.

None of the cases cited by SWBT support its claim that precedent requires use of the competitive necessity doctrine in this case. The Telpak proceedings, the Private Line Guidelines Order, and the OCP Guidelines Order did not involve single-customer offerings. Nowhere in the DS-3 ICB Order does the Commission indicate that single-customer offerings by dominant carriers could be lawful, or that the competitive necessity doctrine could be used to justify such offerings. The Commission did not

reach AT&T's competitive necessity argument in either the AT&T CPP Order or the RCI Order. The fact that AT&T Tariff 15 offerings were eventually allowed to take effect is not relevant.

The Commission's finding that application of the competitive necessity doctrine in this case is not in the public interest is fully consistent with the Commission's economic analysis in the expanded interconnection proceeding and in the Interexchange Order. The Commission concluded that unfettered pricing flexibility on the part of carriers with market power risks preempting the development of competition in the access market. Significantly, SWBT does not dispute the Commission's finding that SWBT faces only minimal competition throughout its region.

The Commission should reject SWBT's "equal protection" argument, as it has on every previous occasion SWBT has made it. The Commission's decision to reject Transmittal No. 2633 is grounded on a rational distinction between different classes of carriers that are not similarly situated, and withstands constitutional challenge since it is rationally related to the Commission's statutory obligations under the Communications Act.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Southwestern Bell Telephone Company)	CC Docket No. 97-158
Tariff F.C.C. No. 73)	CCB/CPD 97-67
Transmittal No. 2633)	
)	

MCI OPPOSITION TO PETITION FOR RECONSIDERATION

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its Opposition to the Petition for Reconsideration filed by Southwestern Bell Telephone Company (SWBT) on December 15, 1997, in the above-captioned docket.

In its petition, SWBT requests that the Commission reconsider and reverse its recent order rejecting SWBT's Transmittal No. 2633.¹ SWBT makes three arguments. First, SWBT argues that, contrary to the Order, applicable precedent supports use of the competitive necessity doctrine in this case. Second, SWBT disputes the Commission's conclusion that SWBT's Transmittal No. 2633 may foreclose competition and is not in the public interest. Third, SWBT argues that the Commission's decision to preclude it from filing RFP tariffs is confiscatory, violates SWBT's right to equal protection under

¹In the Matter of Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Order Concluding Investigation and Denying Application for Review, CC Docket No. 97-158, released November 14, 1997 (Order).

the law, and thereby exceeds the Commission's authority. The Commission should reject these arguments and affirm the Order.

II. Background

In the Order, the Commission concludes that the rates proposed in Transmittal No. 2633 would not be generally available to similarly situated customers.² Under the tariff, the rates would only be available to customers putting out written bid requests seeking the same services in the same quantities at the same central offices. Based on its knowledge of the market for access services, the Commission concludes that the likelihood of more than the original requesting customer requiring the same quantities of the same services at the same central offices is negligible, if not non-existent.³

The Commission finds that precedent does not compel it to apply the competitive necessity doctrine to tariff proposals that are not generally available. The Commission notes that "[i]n those rare instances that the Commission has applied the doctrine in the context of individualized offerings not generally available to similarly situated customers, the Commission rejected the proposals as unlawful without reaching the question of whether the doctrine even should be available to carriers proposing individualized offerings."⁴

²Order at ¶44.

³Id.

⁴Order at ¶40.

After finding that precedent does not compel it to apply the competitive necessity doctrine in this case, the Commission concludes that the public interest requires that it not apply the competitive necessity doctrine to Transmittal No. 2633. The Commission finds that “[g]ranting SWBT the ability selectively to respond with highly particularized offers to written bid requests, before new entrants have established themselves in a particular market . . . may result in SWBT deterring more efficient entrants from profitably entering the market.”⁵ The Commission further concludes that, at least until it revisits these issues in the broader context of a rulemaking proceeding, it will not apply the competitive necessity doctrine to dominant local exchange carriers who are proposing customer-specific tariffs because such an application would thwart the public interest of promoting competition in the local exchange and exchange access markets.⁶

III. Dominant LEC Pricing Flexibility Should be Addressed in the Access Reform Proceeding

It is well-established that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency."⁷ For substantial changes in policy that have far-reaching effects, the Commission has traditionally chosen to proceed by rulemaking. Proceeding by rulemaking permits the Commission more

⁵Order at ¶54.

⁶Id.

⁷SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)..

time to gather relevant facts; in addition, more parties tend to participate in rulemakings, allowing a complete record to be developed.

In this proceeding, as it has on several previous occasions,⁸ SWBT is insisting on its alleged right to change Commission policy and rules in a tariff proceeding. The Commission is correct to observe that the access charge rulemaking will enable it to consider, as a broader matter, under what circumstances incumbent LECs should be accorded greater pricing flexibility than they already have.⁹ Based on the record in this proceeding, the Commission is correct to reject Transmittal No. 2633 as unlawful because it presents a significant potential for harm to the competitive market.¹⁰

IV. Commission Precedent Does Not Require Application of the Competitive Necessity Doctrine to Single-Customer Tariffs

SWBT does not challenge the Commission's finding that the rates proposed in Transmittal No. 2633 would not be generally available. However, SWBT challenges the Order's conclusion that Commission precedent does not require application of the competitive necessity doctrine to tariffs that are not generally available. SWBT contends

⁸See *In the Matter of Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal No. 2312, Order*, 9 FCC Rcd 1616 (1994); *In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2433 and 2449, Order Terminating Investigation*, 11 FCC Rcd 1215 (1995); *In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2622, Order*, DA 97-696, April 8, 1997.

⁹Order at ¶52.

¹⁰Order at ¶56.

that “applicable precedent supports use of the competitive necessity doctrine in this case.”¹¹

First, SWBT argues that the Commission allowed the use of the competitive necessity doctrine in the Telpak proceedings, in the Private Line Guidelines Order, and in the OCP Guidelines Order and that these proceedings “are not contrary to SWBT’s position.”¹² However, because none of these proceedings involved single-customer offerings, they do not require the Commission to make the competitive necessity doctrine available in this case. These proceedings involved discounted offerings available to all similarly situated customers, and are therefore consistent with the Commission’s conclusion that “[i]n the overwhelming majority of our cases in which we considered the doctrine, the proposal involved tariffs that were generally available to similarly situated customers.”¹³ Furthermore, the Commission specifically stated in the Private Line Guidelines Order that it would “assess the adequacy of the competitive-necessity justification on a case-by-case basis.”¹⁴

None of the other cases cited by SWBT support its claim that precedent requires use of the competitive necessity doctrine in this case. Nowhere in the DS-3 ICB Order does the Commission indicate that single-customer offerings by dominant carriers could

¹¹Petition at 2-3.

¹²Id. at 3.

¹³Order at ¶40.

¹⁴In the Matter of Private Line Rate Structure and Volume Discount Practices, Report and Order, 97 FCC 2d 923, 948 (Private Line Guidelines Order).

be lawful, or that the competitive necessity doctrine could be used to justify such offerings. The Commission states only that "[a]t most, the LECs have demonstrated that competitive conditions may justify some departures from a single general offering of DS-3 facilities."¹⁵

SWBT's reliance on the AT&T CPP Order and RCI Order is similarly unavailing. As the Commission discusses in the Order, the Commission did not reach AT&T's competitive necessity argument in either of these orders. While the Commission subsequently asked, in the RCI Supplemental Designation Order,¹⁶ whether AT&T's RCI proposal constituted a single-customer offering and whether the competitive necessity doctrine could be used to justify such offerings, the Commission has not decided these issues. The Bureau has, however, rejected a Tariff 15 offering with geographic restrictions on availability, similar to the terms and conditions in SWBT Transmittal No. 2633 limiting the proposed rates to particular central offices, as unreasonably discriminatory in violation of Section 202(a) of the Communications Act.¹⁷

The fact that AT&T Tariff 15 offerings were eventually allowed to take effect is not relevant. A decision to allow a tariff to go into effect "decides nothing concerning

¹⁵In the Matter of Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; GTE Operating Companies Revision to Tariff F.C.C. No. 1, Memorandum Opinion and Order, 4 FCC Rcd 8634, 8643 (1989) (DS-3 ICB Order) (emphasis added).

¹⁶In the Matter of AT&T Communications Tariff F.C.C. No. 15 Competitive Pricing Plan No. 2 Resort Condominiums International, Supplemental Designation Order and Stay, 7 FCC Rcd 3036, 3037 (RCI Supplemental Designation Order).

¹⁷In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan 22, Order, 7 FCC Rcd 4636 (1992).

the merits of the case; it merely reserves the issues pending a hearing.”¹⁸ Thus, there is no basis for SWBT’s contention that the Commission must explain why allowing Tariff 15 offerings to take effect “does not compel allowing SWBT’s tariff to take effect here.”¹⁹ In any event, the Tariff 15 approach to serving large business customers in the interexchange market has been replaced by a set of rules authorizing “contract tariffs” that must be available to similarly-situated customers.²⁰ There is accordingly no precedent whatsoever that requires competitive necessity to be considered in reviewing a single-customer offering.

V. The Public Interest Does Not Support Unfettered Pricing Flexibility

SWBT disputes the Commission’s conclusion that SWBT Transmittal No. 2633 may foreclose competition and is not in the public interest. It argues that the nine-year-old article it attached to its Direct Case, the affidavit provided with U S West’s Comments on SWBT’s Direct Case, and the affidavit provided with its petition refute the Commission’s conclusion. It contends that “[t]here is no evidence in the record, only mere speculation, unsubstantiated by the sources cited by the order, that competitors will be foreclosed from entering markets if SWBT is allowed to price its services as

¹⁸Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 240 (D.C. Cir. 1980).

¹⁹Petition at 4.

²⁰47 C.F.R. §61.55.

requested.”²¹ SWBT argues that Transmittal No. 2633 is in the public interest because customers will benefit from lower prices.

The Commission has consistently found that unfettered pricing flexibility on the part of carriers with market power risks preempting the development of competition in the access market. In the Expanded Interconnection proceeding, the Commission declined to provide dominant LECs with contract pricing authority.²² Instead, it observed that “too much flexibility could stifle competitive entry and harm customers of less competitive services.”²³ SWBT has not shown that market conditions have changed sufficiently to warrant departing from the policies and rules established in the Expanded Interconnection proceeding.

In the Interexchange Order, the Commission granted AT&T contract pricing authority only after AT&T demonstrated the existence of “substantial competition.”²⁴ In determining whether AT&T faced “substantial competition,” the Commission examined such factors as supply elasticity, including barriers to entry, and market share. An examination of supply elasticity is particularly important because, where there is

²¹Id. at 6.

²²In the Matter of Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd 2718, 2731.

²³In the Matter of Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141, released September 2, 1993, at ¶91.

²⁴In the Matter of Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (Interexchange Order).

substantial supply elasticity, competitors have invested substantial sunk costs, and strategic pricing is thus less likely to be a profitable strategy.²⁵

The Commission's economic analysis in this case is fully consistent with this precedent. Nothing in the record of this proceeding indicates that the access market in SWBT territory is characterized by the level of supply elasticity that would ensure that SWBT would not foreclose the development of a competitive exchange access market. Until competitors have made the substantial investments necessary to enter the market on a facilities basis, "it may well be in SWBT's long-term interest to deprive entrants of the opportunity to achieve significant economies by locking in large customers using customer-specific, long-term contracts."²⁶ Moreover, while in the Interexchange Order the Commission required AT&T to make its contract tariffs generally available to similarly situated customers, as a safeguard against unreasonable discrimination, SWBT's proposed rates are limited to a single customer.

The absence of competition in the exchange access market in SWBT's territory has been validated by the Department of Justice (DOJ) in its recent evaluation of SWBT's Section 271 application for Oklahoma.²⁷ Significantly, the DOJ shares the Commission's concern that dominant LECs can exercise their market power to frustrate

²⁵In the Matter of Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, CC Docket No. 94-1, September 20, 1995, at ¶149.

²⁶Order at ¶49.

²⁷Evaluation of the U.S. Department of Justice, CC Docket No. 97-121, filed May 16, 1997 at 44 ("On a nationwide basis, most customers still lack any alternative to the incumbent LEC for local exchange or switched access services.").

competition, and has noted the difficulties in using regulation to remedy anticompetitive actions by dominant market participants.²⁸ The Commission used sound judgement in the instant case to block SWBT's efforts to assign itself significant pricing flexibility before competitive conditions emerge that would serve to limit SWBT's ability to exercise market power to disadvantage competitors and discriminate among customers.

Significantly, neither SWBT's petition nor the affidavits or other sources cited by SWBT dispute the Commission's findings regarding the level of competition in the access market. SWBT does not dispute: (1) that SWBT faces only minimal competition throughout its region;²⁹ (2) that Transmittal No. 2633 would permit it to offer individualized services even in areas where no competitive entry has occurred;³⁰ (3) that Transmittal No. 2633 would permit SWBT to offer switched access services on a customer-specific basis, even though its assertions of competition are limited to special access services;³¹ and (4) that the RFP response tariffs would not be available to similarly situated customers.³² SWBT's economic "evidence" thus adds nothing of substance relevant to any issues of decisional significance. Given this record, and previous Commission economic analysis of the potential for strategic pricing by

²⁸Id. at 46-47 (specifically noting the problem of dominant ILECs engaging in discriminatory practices).

²⁹Order at ¶53.

³⁰Order at ¶50.

³¹Order at ¶48.

³²Order at ¶44.

dominant carriers, the Commission was correct to find that permitting SWBT to use the competitive necessity doctrine is not in the public interest. The Commission should deny SWBT's petition for reconsideration.

VI. The Commission Should Reject SWBT's Constitutional Argument

SWBT argues that by rejecting Transmittal No. 2633, the Commission has "precluded SWBT from competing in many access markets."³³ It contends that "[t]he effect is confiscatory, violates SWBT's right to equal protection under the law, and thereby exceeds the Commission's authority."³⁴

The Commission should reject SWBT's "equal protection" argument, as it has on every previous occasion SWBT has made it.³⁵ As the Commission discusses in the Order, the economic characteristics of competitive access providers (CAPs) and SWBT are strikingly different. While CAPs are unable to take any action that will result in a lessening of competition, SWBT could potentially deter entry by targeting access service offerings to a few large customers.³⁶ The Commission's decision to reject Transmittal

³³Petition at 7.

³⁴Id.

³⁵In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 n.21 (1993); In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2297 and 2312, Memorandum Opinion and Order, 11 FCC Rcd 3613, 3616 (1996).

³⁶Order at ¶53.

No. 2633 is therefore grounded on a rational distinction between different classes of carriers that are not similarly situated, and withstands constitutional challenge since it is rationally related to the Commission's statutory obligations under the Communications Act.³⁷

SWBT is fully able to respond to the current level of competition in the access market. The Commission has eliminated SBI lower limits, and has granted incumbent LECs the authority to offer term and volume discounts and to deaverage their rates into three zones.³⁸

VII. Conclusion

For the reasons stated herein, MCI recommends that the Commission reject SWBT's petition for reconsideration.

Respectfully submitted,
MCI TELECOMMUNICATIONS
CORPORATION



Alan Buzacott
Regulatory Analyst
1801 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-3204

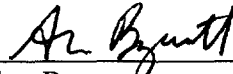
January 12, 1998

³⁷See Nondominant Carrier Tariff Order, 8 FCC Rcd at 6754 n. 21 (citing City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985)).

³⁸See Order at ¶56.

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on January 12, 1998.



Alan Buzacott
Regulatory Analyst
1801 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 887-3204

CERTIFICATE OF SERVICE

I, John E. Ferguson III, do hereby certify that copies of the foregoing Opposition in the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73 were sent via first-class mail, postage paid, to the following on this 12th day of January, 1998.

James Schlichting**
Chief, Competitive Pricing Division
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

Jane Jackson**
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

International Transcription Service**
2100 M Street, N.W.
Suite 140
Washington, DC 20037

Ava B. Kleinman
Mark C. Rosenblum
Peter H. Jacoby
AT&T
295 North Maple Avenue
Room 3252J1
Basking Ridge, NJ 07920

Russell M. Blau
Swidler & Berlin
3000 K Street NW
Suite 300
Washington, DC 20007

J. Manning Lee
Vice President, Regulatory Affairs
TCG
Two Teleport Drive - Suite 300
Staten Island, NY 10311

Leon M. Kestenbaum
Marybeth M. Banks
Sprint
1850 M Street NW, Suite 1110
Washington, DC 20036

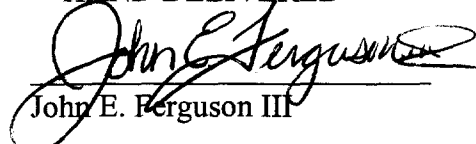
Brian Conboy
Thomas Jones
Wilkie Farr & Gallagher
Three Lafayette Center
1155 21st St., NW
Washington, DC 20036

Eric J. Branfman
Swidler & Berlin
3000 K Street NW
Suite 300
Washington, DC 20007

William T. Lake
John H. Harwood II
David M. Sohn
Wilmer Cutler & Pickering
2445 M Street, NW
Washington, DC 20037-1420

Robert B. McKenna
Jeffrey A. Brueggeman
U S West, Inc.
Suite 700
1020 19th Street, NW
Washington, DC 20036

**HAND DELIVERED


John E. Ferguson III